



- (2) Was respondent provided timely notice pursuant to K.S.A. 44-520 (Furse 1993)?
- (3) What, if any, is the nature and extent of claimant's injury and/or disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Appeals Board adopts the findings and conclusions of the Administrative Law Judge as its own.

Claimant, the assistant manager at Chili's restaurant in Overland Park, Kansas, alleged accidental injury on August 9, 1998, while moving a 50-pound box of lettuce. Claimant testified that she felt pain in her back on the left lower side immediately after moving the box.

Claimant's general manager, Laura Pendergraft, noticed claimant was walking in an unusual fashion and inquired as to whether something was wrong. Claimant advised that she was having back pain and it was bothering her. Claimant testified that she told the manager, at the time, that she had injured her back. Ms. Pendergraft acknowledged being told that claimant was having back pain, but denied being told, at that time, that it was due to a work-related accident.

Claimant obtained medical treatment through various health care providers, ultimately coming under the care of board-certified orthopedic surgeon David John Clymer, M.D.

In January 1999, claimant underwent an MRI, which revealed some disc prominence at L5-S1 at the midline level. A second MRI, done on April 20, 1999, at Dr. Clymer's request, indicated mild degenerative disc disease at L5-S1, but no other abnormalities. Dr. Clymer felt claimant's symptoms were aggravated by the lifting incident at work. Claimant returned to work for respondent, performing her regular duties. No restrictions were placed upon her by Dr. Clymer because claimant advised him that she was able to delegate whatever duties were beyond her abilities. He, therefore, felt she could continue doing the work so long as she avoided any work duties which gave her difficulties.

Claimant continued working for respondent, although in pain, until the first part of May 2000. By that time, the pain had become unbearable and claimant felt she could no longer continue working. She terminated her employment with respondent and, on June 13, 2000, became employed with Retirement Resources in Overland Park as an administrative assistant.

While working for respondent, claimant earned an average weekly wage of \$673.08, excluding fringe benefits. Claimant further indicated she earned a bonus of approximately \$300 to \$350 per month, which the Administrative Law Judge averaged to \$325 per month or \$75 per week. The Administrative Law Judge found claimant's average weekly wage to be \$748.08. This finding is not disputed.

Claimant is earning \$25,000 a year while working for Retirement Resources, but receives no fringe benefits.

Even though Dr. Clymer did not place restrictions on claimant, he did testify that she had specific limitations. In reviewing the task list prepared by vocational expert Terry Cordray, Dr. Clymer testified that claimant was incapable of performing three of eighteen tasks, for a loss of task performing ability of 17 percent. Dr. Clymer was also presented a task list prepared by vocational expert Michael J. Dreiling. Dr. Clymer felt claimant was incapable of performing four or five of the thirteen tasks, for a 31 to 38 percent loss of task performing ability.

Claimant was referred to board-certified orthopedic surgeon Dale Edward Darnell, M.D., for an independent medical examination by the Administrative Law Judge. Dr. Darnell diagnosed degenerative disc disease and reviewed the MRI reports which verified the L5-S1 disc protrusions and degenerative disc disease.

Dr. Darnell also adopted Mr. Cordray's task opinion, finding claimant incapable of performing seven of the eighteen tasks, for a 39 percent task loss. In reviewing Mr. Dreiling's list, Dr. Darnell also found claimant incapable of performing four or five of the thirteen tasks, for a 31 to 38 percent task loss.

Both Dr. Clymer and Dr. Darnell expressed limited reservations about claimant's ability to perform two of the tasks on Mr. Dreiling's list. They both decided claimant could do those tasks, although with reservations. Therefore, the Board finds their task loss opinions to fall between the 31 and 38 percent.

Claimant was referred to board-certified orthopedic surgeon Edward J. Prostic, M.D., at the request of his attorney. Dr. Prostic examined claimant, finding a small left paracentral disc herniation at L5-S1 with nerve root impingement, mild disc space narrowing at L5-S1 and early degeneration. In reviewing Mr. Dreiling's task list, Dr. Prostic

found claimant capable of performing only four of the thirteen tasks, for a 69 percent loss of task performing abilities.

Dr. Clymer found claimant to have suffered a 5 percent impairment to the body as a whole as a result of the injuries with respondent, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA Guides). Likewise, utilizing the AMA Guides, Fourth Edition, Dr. Darnell assessed claimant a 3 percent impairment to the body as a whole, with Dr. Prostic assessing claimant a 14 percent impairment to the body as a whole.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g). Respondent contends claimant failed to notify respondent of the accidental injury in a timely fashion. K.S.A. 44-520 (Furse 1993) obligates that a claimant provide notice of accident within ten days, stating the time, place and particulars of the accident. In this instance, claimant testified she talked to her supervisor, Laura Pendergraft, within two days of the accident. Ms. Pendergraft acknowledges talking to claimant about her back pain, but denies that claimant advised her it was work related. The Appeals Board finds claimant is the more credible witness and, accordingly, finds claimant did provide timely notice of accident pursuant to K.S.A. 44-520 (Furse 1993).

With regard to whether claimant suffered accidental injury arising out of and in the course of her employment, the Appeals Board finds claimant's description of the accident to be credible. Claimant's description of the accident has been consistent throughout when dealing not only with respondent's employees, but also with the health care professionals who provided her care and treatment. The Appeals Board, therefore, finds that claimant has proven that she suffered accidental injury arising out of and in the course of her employment on the date alleged.

With regard to the nature and extent of claimant's injury and disability, the Administrative Law Judge found Dr. Darnell to be the most objective and unbiased, being the independent medical examiner appointed by the Court. While there was substantial dispute between Dr. Darnell and claimant's attorney, it is noted that the task loss opinions of Dr. Darnell very closely mirror those of Dr. Clymer, the treating physician. The Appeals Board, therefore, finds Dr. Darnell's opinion of claimant's task loss to be the most credible and objective in the record. Accordingly, the Appeals Board affirms the Administrative Law Judge's Award and adopts the 31 percent task loss of Dr. Darnell.

The Administrative Law Judge, in comparing claimant's \$748.08 average weekly wage with her current \$25,000 per year salary (which computes to \$480.77 per week), found claimant had suffered a 36 percent wage loss, which the Appeals Board also affirms. In combining the two, as required by K.S.A. 1998 Supp. 44-510e, the Appeals Board finds

that claimant has suffered a 33.5 percent permanent partial disability to the body as a whole for the injuries suffered on August 9, 1998.

The Appeals Board, therefore, finds that the Award of the Administrative Law Judge should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated June 11, 2001, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant  
Omid Amjadi, Attorney for Respondent  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director